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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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12 FRANK PARET HOWARD,
13 Petitioner,
14 v.
15 J. SOTO, Warden,
16 Respondent.
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Case No. CV 15-02639-AG (SHK)

ORDER ACCEPTING REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

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19 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the
20 records and files herein, and the Report and Recommendation of the United States
21 Magistrate Judge. Objections to the Report and Recommendation have been filed
22 by Petitioner, and the Court has made a de novo determination of those portions of
23 the Report and Recommendation to which objections have been made. The Court
24 accepts the findings and recommendation of the Magistrate Judge.

25 In his Objections, Petitioner contends that the Magistrate Judge incorrectly
26 concluded that he had failed to meet the standards for relation back set forth in
27 Fed. R. Civ. P. 15(c)(1), (c)(1)(A)-(B). Petitioner is incorrect. As the Magistrate
28 Judge set forth in the Report and Recommendation, Petitioner's original Petition

1 for Writ of Habeas Corpus was timely filed in this Court on April 9, 2015.
2 Following the granting of a stay to exhaust additional claims, Petitioner's Motion to
3 Amend and the proposed First Amended Petition ("FAP") were not
4 constructively filed until March 16, 2017, which was nearly two years after the May
5 12, 2015 one-year period of limitation under the Anti-Terrorism and Effective
6 Death Penalty Act. Thus, as the Magistrate Judge correctly found, unless the new
7 claims proposed in the FAP related back to the filing date of the original Petition,
8 they were untimely. Because the proposed claims in the FAP raised ineffective
9 assistance of counsel claims and a cumulative error claim that were not "tied to a
10 common core of operative facts" underpinning the claims properly contained in
11 the original Petition, the Magistrate Judge correctly concluded that the Motion to
12 Amend should be denied. Mayle v. Felix, 545 U.S. 644, 664 (2005).

13 Next, insofar as the Court can tell, Petitioner contends that the Court erred
14 in failing to grant the stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005). This
15 objection is directed to the granting of the stay in the first instance, and not to the
16 Report and Recommendation issued by the Magistrate Judge. In any event, the
17 Court finds that, in issuing the Order Granting Petitioner's Request For Stay, the
18 then-assigned Magistrate Judge correctly concluded that Petitioner failed to meet
19 the standard set forth for the granting of a stay pursuant to Rhines because
20 Petitioner failed to identify any of the claims he sought to exhaust in state court
21 such that the Court could not assess their merit; Petitioner failed to establish good
22 cause for a stay under Rhines; and Petitioner failed to show that he was not engaged
23 in intentionally dilatory litigation tactics.¹

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1 The then-assigned Magistrate Judge also found that the fact that the Petition was wholly exhausted meant that it could not be subject to a stay under Rhines. Subsequent to the issuance of the Order Granting Petitioner's Request For Stay in this case, the Ninth Circuit issued its decision in Mena v. Long, 813 F.3d 907 (9th Cir. 2016), holding that a district court may stay a fully exhausted petition under Rhines. Nevertheless, this decision does not render erroneous the Magistrate Judge's determination that a Rhines stay was inappropriate in this case given the

1 In granting the stay pursuant to Kelly, the Magistrate Judge expressly
2 advised Petitioner that he bore the risk that he may be precluded from adding the
3 newly exhausted claims to the Petition if they were determined to be untimely and
4 not sufficiently related to his timely claims pursuant to Pace v. DiGuglielmo, 544
5 U.S. 408, 416 n.6 (2005) and Mayle, 545 U.S. at 650, 664.

6 The Court finds that the Objections do not alter the findings and conclusions
7 of the Magistrate Judge. Thus, having made a de novo determination to those
8 portions of the Report and Recommendation to which objections have been made,
9 the Court accepts the findings, conclusions, and recommendations of the
10 Magistrate Judge.

11 Accordingly, IT IS ORDERED THAT: (1) The Report and
12 Recommendation is accepted; (2) Respondent file an Answer on the merits of the
13 original Petition within thirty (30) days of the date of this Order; and
14 (3) The Clerk serve copies of this Order on the parties.

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17 Dated: April 27, 2018



HONORABLE ANDREW GUILFORD
United States District Judge

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20 Presented by:



HONORABLE SHASHI H. KEWALRAMANI
United States Magistrate Judge

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28 Petitioner's failure to set forth his proposed amended claims, his failure to show good cause, and
his failure to demonstrate that he was not engaged in intentionally dilatory litigation tactics.